

From: *Abhay Padgaonkar, Consumer Advocate*
Date: March 12, 2023
Docket: Commission's **Investigation** and Promulgation of a Code of Ethics (**AU-00000E-17-0079**) and 2022 APS Rate Case (**E-01345A-22-0144**) and 2022 TEP Rate Case (**E-01933A-22-0107**)
Re: **Reply to Commissioner Kevin Thompson's Letter about the Ethics Complaint**

March 12, 2023

Robin R. Mitchell
Chief Counsel & Legal Division Director
Arizona Corporation Commission
1200 W. Washington Street
Phoenix, AZ 85007

Re: Response to Commissioner Kevin Thompson's Letter about the Ethics Complaint

Dear Ms. Mitchell:

The following, based on currently available information, is in reply to Commissioner Kevin Thompson's letter dated March 1, 2023 and docketed on March 8, 2023 in Docket No. AU-00000E-17-0079. The letter is beset with mischaracterizations, conflicting statements, and a lack of full disclosure.

We now know from 12News reporting that the American Gas Association (AGA) falsely used the National Association of Regulatory Utility Commissioners (NARUC) name although NARUC was "absolutely not" a co-sponsor of the January event. The AGA promoted the event as "AGA/NARUC NEW YORK FINANCIAL COMMUNITY VISITS". Commissioner Thompson went even further by placing the NARUC name first and called it "joint National Association of Regulatory Utility Commissioners-American Gas Association Financial Community meetings." As 12News reported, "NARUC co-sponsoring such an event would have certainly lent it greater credibility."¹

Why attempt to lend credibility? Probably because the AGA-SWG-ACC nexus would be unseemly. The AGA is a powerful lobbying organization that uses millions of dollars from utility customers to promote a fossil fuel agenda.² Southwest Gas requested recovery of \$344,613 from Arizona ratepayers for its AGA membership dues, according to Decision No. 78845 in Docket No. G-01551A-21-0368, which shows that ex parte is still invoked. Commissioner Thompson, a former manager and lobbyist at Southwest Gas (an AGA member) and now a regulator, voted to approve the Southwest Gas rate increase within days of being sworn in.

The AGA told 12News that the alleged purpose of the January meeting was to "educate state utility regulators about the roles of financial community **stakeholders**" (emphasis added). Merriam-Webster defines a stakeholder as "one that has a stake (an interest or share in an undertaking or enterprise) in an enterprise" or "one who is involved in or affected by a course of action."³ The financial community "stakeholders" that Commissioner Thompson mischaracterizes as "lenders" are credit rating agencies (Fitch, Moody's, and S&P) and investment and advisory financial services firms (He claims to have met with Bank of America, BMO Financial Group, Citi, Credit Suisse, Guggenheim Partners, Morgan Stanley).

¹ "Commissioner will change response to ethics complaint following 12News reports" at:

<https://www.12news.com/article/news/local/arizona/commissioner-will-change-response-ethics-complaint-following-12news-reports/75-810f5db5-7e25-4d32-a33e-e63d4493f714>

² "AGA uses millions of dollars from utility customers to promote a fossil fuel agenda" at:

<https://www.energyandpolicy.org/gas-utilities-greenwashing-to-expand-fossil-fuels-rng-hydrogen/aga-uses-millions-of-dollars-from-utility-customers-to-promote-a-fossil-fuel-agenda/>

³ Please see <https://www.merriam-webster.com/dictionary/stakeholder>

The "stakeholders" are not some random people casually "'interested' in the outcome of Arizona's energy policy/decisions" as Commissioner Thompson mischaracterizes them. They represent an industry with an enormous stake in his energy policy/decisions. Their firms and their advisory clients lend or invest hundreds of millions of dollars in Arizona's regulated utilities (or their parent companies), including APS (PNW), SW Gas (SWX), and TEP (FTS). Their reputation is staked on the credit ratings for the companies and buy/sell ratings and price targets for the stock that they provide to their paying clients for a fee. Their firms manage or co-manage a public offering of securities, receive compensation for investment banking services, list the regulated utilities as their clients, have beneficial ownership of the common stock, and disclose a significant financial interest in the stock of the regulated utilities or their parent companies.

The table below shows how extensive the coverage and stake these firms and equity analysts Commissioner Thompson is supposed to have met with (in bold) have in the three largest investor-owned utilities in Arizona:

Firm (Analysts)	APS (PNW ⁴)	SW Gas (SWX ⁵)	TEP (FTS ⁶)
Bank of America (Julien Dumoulin-Smith, Dariusz Lozny)	X	X	X
BMO (Ben Pham)			X
Citi (Ryan Levine)		X	
Credit Suisse (Nick Campanella, Andrew Kuske)	X		X
Guggenheim (Shar Poureza)	X		
J.P. Morgan (Richard W. Sunderland)		X	X
Morgan Stanley (Stephen Byrd)	X		
Wolfe Research (Michael Sullivan, Steve Fleishman)	X		X

That is the very definition of an unregistered lobbyist that the ACC Code of Ethics Rule 5.2 prohibits a Commissioner from knowingly communicating with: "Any person, **representing an industry** ... whose interests will be affected by Commission decisions, and whose intent is to influence any decision, legislation, policy, or rulemaking within the Commission's jurisdiction."

In a sign of a symbiotic relationship between the monopolies and the Wall Street firms, APS used their vitriolic comments and reports criticizing the ACC (e.g., "Commission Falls Apart", "single most value destructive regulatory environment in the country", "misconstrue the fundamentals of utility ratemaking", "ROO'd Awakening") from these very analysts/firms as a justification to fearmonger and pressure the Commission to

⁴ PNW Analyst Coverage at: <https://www.pinnaclewest.com/investors/stock-information/analyst-coverage/default.aspx>

⁵ SWX Analysts Coverage at: <https://investors.swgasholdings.com/stock-information/analyst-coverage>

⁶ FTS Analysts Coverage at: <https://www.fortisinc.com/investor-relations/faq/analysts>

approve its ROE and rate increase requests in the previous rate case.⁷ (Spoiler Alert: None of the dire, "the sky will fall on Arizona if you don't grant APS the rate increase" scenarios have come true.)

The idea that these so-called "lenders" with such an enormous financial, operational, and reputational stake would privately meet with regulators and not attempt to influence them seems to strain credulity. Why then would they meet with Commissioner Thompson, if not to get into his head to favorably influence Arizona's regulatory environment and energy policy/decisions? There is no borrowing crisis for the regulated utilities nor are their credit ratings below investment grade. So what exactly was the "lender perspective" that Commissioner Thompson understood from them? He makes it clear in his social media posts.

Commissioner Thompson writes that part of the meeting was to "better understand the lender perspective as subject matter experts." But that claim is at odds with the claim he makes later that they "did not advocate or attempt to influence any decision, legislation, policy, or rulemaking within the Commission's jurisdiction." He also claims that "no docket matters active before the Commission were discussed" and "no specific project or projects were discussed." Commissioner Thompson did something much worse: He discussed the regulatory environment that undergirds and governs all current and future contested matters. That is the very definition of ex parte communication. What is more substantive to the merits of all contested proceedings than the regulatory environment lens through which the decisionmaker will view every piece of evidence with a preordained end goal in mind?

Commissioner Thompson didn't have to discuss specific matters or projects, especially when just deliberating financial terms and issues and even just discussing the regulatory environment would implicate the questions that will come up and cut across every current and future rate case. Commissioner Thompson went far beyond a mere discussion of the regulatory environment. He promised action by letting the unregistered lobbyists know that "Arizona is a great place in which to invest, and that the Arizona Corporation Commission is no longer going to allow the regulatory environment in Arizona to be dead last in the nation."⁸ And yet, despite this apparent ex parte violation, Commissioner Thompson has failed to make the substance of the communication available in the public record of the case or proceeding, as required by A.A.C. R14-3-113.

Decision No 78040 was unanimously approved and signed by all five corporation commissioners, three of them, Chairman O'Connor, Commissioner Márquez Peterson, and Commissioner Tovar, are still on the panel. The ACC Code of Conduct for Elected and Appointed Officials warns that a commissioner must "Make no promises on behalf of a Commissioner" in unofficial settings. It goes on to assert that "It is inappropriate to overtly or implicitly promise Commissioner's action."⁹ Commissioner Thompson's Facebook post, announcing that he overtly made an overarching promise for lax regulatory oversight, along with his Twitter reply that "The regulatory environment has been terrible for years. Time for change!"¹⁰ did exactly that. These posts indicate that he has violated the ACC Code of Ethics and prejudged the issues by promising lax regulatory oversight as demanded by the regulated utility management and their wealthy, vocal, and influential backers.

Commissioner Thompson met with several unregistered lobbyists who have a major financial stake in the utilities and whose priorities run contrary to the interest of captive ratepayers. To wit, a report co-authored by Obie Ugboaja, Director, S&P Global Infrastructure Ratings – U.S. Regulated Utilities, who was on the AGA meeting agenda, said this in Wall Street jargon: "Managing regulatory risk is one of the most important elements for maintaining credit quality, which is often challenging because of regulators' concern regarding the impact to the customer bill." In other words, conscientious regulators balk at lowering regulatory risk willy-

⁷ Various APS filings at: <https://docket.images.azcc.gov/E000016051.pdf>, <https://docket.images.azcc.gov/E000016054.pdf>, <https://docket.images.azcc.gov/E000016064.pdf>, and <https://docket.images.azcc.gov/E000016073.pdf>

⁸ <https://www.facebook.com/ThompsonforCorpComm/>

⁹ "ACC Code of Ethics as Amended, Decision No. 78040, Att. A" at: <https://docket.images.azcc.gov/0000203873.pdf>

¹⁰ <https://twitter.com/VoteKThompson/status/1616873069901156354?cxt=HHwWhMDUpbLfpPAsAAAA>

nilly because of their concern that it comes at the expense of higher customer bills. In short, regulatory risk and customer bills move in opposite directions.

A common red herring used by the utilities and their Wall Street cronies is that if you don't grant the rate increase request, it will increase the borrowing costs that are passed on to the customers. But they always talk in vague generalities and never quantify the trade-off between higher borrowing costs vs. higher customer bills. My analysis showed that to save \$1 million in borrowing costs, APS customer bills would have had to go up by \$50 million in the previous APS rate case.¹¹

From 2009-2018, Pinnacle West shares shot up by 300% when the electricity rates skyrocketed by 30%.¹² PNW investors loved the APS's hand-picked regulators after the 2014 (APS dark money campaign) and 2016 (independent expenditure support of three ACC candidates) elections. As the decisions in the 2012 and 2016 rate cases started fattening APS profits, the investors were elated and bid up the PNW stock to all-time highs. Pinnacle West CEO Don Brandt was paid \$14.5 million in 2018.¹³ At the same time, ratepayers like Stephanie Pullman were literally dying because they couldn't afford to pay the bills. APS shut off electricity service due to non-payment 110,029 times or to one in ten customers in 2018.¹⁴ It goes to show that investors' priorities often run contrary to the interest of captive ratepayers. A promise by Commissioner Thompson to lower the regulatory risk despite a negative impact on customer bills indicates that he has prejudged the issues in favor of the regulated monopolies and against the captive ratepayers.

As it relates to Commissioner Thompson's claim that the stakeholders are exempt as subject matter experts, the Attorney General's Arizona Agency Handbook states: "Technical persons do not have to register with the Secretary of State in any fashion as long as the technical person provides information at the request of a lobbyist."¹⁵ Further, the Agency Handbook states that a person who is registered as a lobbyist or is a lobbyist (**even if unregistered**) "shall disclose that fact to the public official." Similarly, the subject matter expert reference in Rule 5.2 is intended to refer to experts "who provide technical information at the request of a Commission lobbyist." It is not a carte blanche for wealthy, vocal, and influential stakeholders representing an industry whose interests will be affected by Commission decisions and whose intent is to influence the regulatory climate to be anointed subject matter experts so that they can lobby a commissioner in private without registering.

Sierra Club is an intervenor in the pending APS rate case. Sandy Bahr, Director of the Sierra Club's Grand Canyon Chapter, told 12News this: "It's unethical, that's for sure, and it seems for me that it would be very difficult for him to demonstrate that he can be impartial relative to the utilities' rate cases. He's already told the utilities' investors that he's going to deliver." NARUC's code of ethics dictates, "**A Commissioner should disqualify himself or herself in a proceeding in which his or her impartiality might reasonably be questioned, including, but not limited to, instances where: (a) The Commissioner has a personal bias or prejudice concerning a party.**"¹⁶

Commissioner Thompson's letter claims that he did not position his comments "as a representation of the full ACC." His Facebook post in which he wrote that "My purpose was to let them know that Arizona is a great place in which to invest, and that the Arizona Corporation Commission is no longer going to allow the regulatory environment in Arizona to be dead last in the nation" contradicts his claim of acting in his individual

¹¹ The Fitch Ditch at: <https://docket.images.azcc.gov/E000016203.pdf>

¹² "Ignore the equity analysts' temper tantrums" at: <https://docket.images.azcc.gov/E000016100.pdf>

¹³ "See executive pay at Arizona companies" at: <https://www.azcentral.com/pages/interactives/news/local/arizona-data/highest-paying-jobs-employees/>

¹⁴ "1 in 10 APS customers lost service for unpaid bills in 2018" at: <https://www.12news.com/article/news/1-in-10-aps-customers-lost-service-for-unpaid-bills-in-2018/75-5e541a70-8880-43b4-978f-285b53a83233>

¹⁵ Attorney General's Arizona Agency Handbook Chapter on Lobbying at: https://www.azag.gov/sites/default/files/docs/agency-handbook/2018/agency_handbook_chapter_16.pdf

¹⁶ NARUC Code of Ethics at: <https://pubs.naruc.org/pub.cfm?id=536B93AB-2354-D714-510F-2D034D678522>

capacity. Not only did he speak for the Commission as a whole, but he included a link to the Commission's Facebook page. Commissioner Myers's "Amen brotha!" endorsement raises even more troubling questions about commissioners openly cooperating to the detriment of the ratepayers.

A Commissioner is a Presiding Officer along with the Administrative Law Judge according to Ariz. Admin. Code § 14-3-102(G). Imagine if a presiding judge in a court case — even before an evidentiary hearing is held and even before full evidence is presented — traveled across the country to meet privately with wealthy, vocal, and influential backers of one side without the presence of the other side claiming that it was for an "ongoing education effort" and to understand their "perspective as subject matter experts." Just like a judge in a courtroom, a corporation commissioner does his or her job by examining evidence presented in rate cases by all sides in public — not by wining and dining with regulated utility investors in private and by making an overarching promise of lax regulatory oversight to reduce regulatory risk in their favor.

Commissioner Thompson's comment about the complaint weaponizing the code of ethics is unfortunate and ignores the long and sordid history of scandals at the ACC. A letter unanimously signed, including by three sitting commissioners (Chairman O'Connor, Commissioner Márquez Peterson, and Commissioner Tovar), recounts the tawdry backdrop for instituting the code of ethics: "The Commission wanted to assure the public that the statewide elected Commissioners would adhere to stringent ethical standards. You may recall that during that time, a former Commissioner was indicted on bribery charges and it was suspected and later confirmed that the state's largest investor-owned utility had engaged in the use of an independent expenditure committee to influence the 2014 and 2016 Commission elections. It was against that backdrop that the Commission instituted its Code of Ethics."¹⁷

Although the Commission's letter referenced, without naming names, the scandal involving former ACC chairman Gary Pierce and APS's 2014 and 2016 electioneering shenanigans, it left out several crises of unethical conduct, including Tony West,¹⁸ Susan Bitter Smith,¹⁹ Andy Tobin,²⁰ and Ted Vogt.²¹ The Commission's letter, however, did affirm the immutable truth that the Commission would do well to keep in mind as it investigates this ethics complaint: **"Public confidence in the Commission is eroded if the public perceives that a Commissioner is not acting impartially."** All together now: "Amen brotha!"

- 1) I renew my demand for the Commission to hold a public vote to disqualify Commissioner Thompson if he fails to recuse himself, with the hope that he will recuse himself from the disqualification vote.
- 2) Failing this, I urge the intervenors to raise the issue in the APS, TEP, and other rate cases, and raise it on appeal, if necessary.
- 3) Just like Attorney General Mark Brnovich's investigation of and special action against Arizona Corporation Commissioner Susan Bitter Smith for an alleged violation of a conflict of interest statute,²² I am urging Attorney General Kris Mayes to launch an investigation of Commissioner Thompson's conduct and, if necessary, a special action for removal from office.

¹⁷ Commission's Letter to the legislators at: <https://docket.images.azcc.gov/E000016478.pdf>

¹⁸ "Removal of Tony West in state's best interest" at: https://azdailysun.com/removal-of-tony-west-in-states-best-interest/article_0718158a-6a78-5b7e-ac03-746559cc285c.html

¹⁹ "Susan Bitter Smith Resigns from Arizona Corporation Commission Effective January 4" at: <https://www.phoenixnewtimes.com/news/susan-bitter-smith-resigns-from-arizona-corporation-commission-effective-january-4-7904348>

²⁰ "AG's office probes whether officials used public resources to oppose Prop. 127" at: https://tucson.com/news/local/ags-office-probes-whether-officials-used-public-resources-to-oppose-prop-127/article_089b59e0-b28e-5499-ac77-b80aa0578af2.html

²¹ "Ted Vogt out as Corp Comm director over conflict of interest" at: https://www.tucsonsentinel.com/local/report/070518_vogt/ted-vogt-out-as-corp-comm-director-over-conflict-interest/

²² "AG Brnovich Files Petition to Remove Commissioner Bitter Smith From Office" at: <https://www.azag.gov/press-release/ag-brnovich-files-petition-remove-commissioner-bitter-smith-office>